STATE OF MICHIGAN

COURT OF APPEALS

MARLO BEAUTY SUPPLY, INC a Michigan corporation and ALLIED BARBER AND BEAUTY SUPPLY, INC, a Michigan corporation

Plaintiffs-Appellees/Cross-Appellants,

v

FARMERS INSURANCE GROUP OF COMPANIES and TRUCK INSURANCE EXCHANGE, a foreign corporation authorized to engage in general insurance business in the State of Michigan,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
May 26, 2005

No. 247224
Wayne Circuit Court
LC No. 93-308567-CK

Before: Meter, P.J., and Wilder and Schuette, JJ.

WILDER, J., *dissenting.*

I respectfully dissent. I would reinstate the judgment of the first trial court in favor or defendants, rendered based on that trial court's finding that there was no products liability coverage under the policy in question.

First, I disagree with the majority's conclusion that the law of the case doctrine operates to prevent this panel from reconsidering the decision made by this Court in *Marlo Beauty Supply v Farmers Ins Group*, 227 Mich App 309, 323; 575 NW2d 324 (1998) ("*Marlo I*"). The *Marlo I* panel stated that "[t]emporarily ignoring the policy's exclusions, [the] general policy language [at issue] would have led plaintiffs reasonably to expect that defendants were obligated to defend them against the suits brought by the underlying plaintiffs." *Id.* at 317. The *Marlo I* panel went on to find in part that as a matter of law, "unless other policy language excluded coverage, the trial court erred in finding that plaintiffs did not have a reasonable expectation of coverage." *Id.* The *Marlo I* panel later repeated its legal conclusion that "the general terms of the policy would have led plaintiffs to reasonably expect that they had products liability coverage," *id.* at 323, in concluding that a question of fact remained as to whether the plaintiffs' president, Michael Asher, signed the endorsements that restricted policy coverage.

The majority concludes that the *Marlo I* panel did not employ a reasonable expectations doctrine analysis in reaching its decision because its remand for further proceedings was prefaced on a finding that the general policy language was clear and unambiguous. I disagree with this conclusion, because had it intended to determine that the insurance policy was clear and unambiguous, the *Marlo I* panel could not have excluded from consideration the endorsements to the contract. See, *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332-333, 340; 632 NW2d 525 (2001) (holding (1) "[a]n insurance policy is a contract that should be read *as a whole* to determine what the parties intended to agree on . . . "; (2) "[c]lear and specific exclusionary clauses must be given effect . . . ."; and (3) "conflicts between the terms of an endorsement and the form provisions of an insurance contract are resolved in favor of the terms of the endorsement") (Emphasis added). Because the *Marlo I* panel made no effort to consider the language of the endorsements before determining that the language of the policy was clear, it is apparent that the legal analysis employed by the *Marlo I* panel was inextricably dependant upon the application of the reasonable expectations doctrine[1] which, of course, was rendered wholly inapplicable to the interpretation of insurance contract language by the Michigan Supreme Court in *Wilkie v Auto Owners Ins Co*, 469 Mich 41, 63; 664 NW2d 776 (2003). As such, *Marlo I* is not controlling on this panel due to the intervening change of law. *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995).

Because I would conclude that *Marlo I* is not controlling on this panel, I would further conclude that the findings by the first trial court, that the evidence in the case established that "[t]here was not any products liability insurance in effect, even from the beginning," was not clearly erroneous, and that the judgment of the first trial court in favor of the defendants should be reinstated.

The first trial court found that the declaration sheet for the policy at issue indicated that there was no product liability coverage, that plaintiffs never paid premiums for product liability coverage, and that while plaintiffs may have expected that the policy provided product liability coverage, defendants, through their agent, William Abraham, did not understand that plaintiffs had requested product liability coverage when the policy was issued. As such, the trial court found there was no meeting of the minds on the provision of product liability coverage, and found that no such coverage existed. Plaintiffs have failed to demonstrate that these findings are clearly erroneous, and this failure is, in my judgment, fatal to plaintiff's claims on appeal.

To this extent, whether the evidence shows that plaintiff did or did not sign the endorsements in question is irrelevant under *Wilkie*. As noted by the panel in *Marlo I*, whether or not Asher signed the policy restriction endorsements was relevant only for purposes of determining whether plaintiffs could have reasonably expected coverage under the policy. *Marlo I, supra* at 323. The *Marlo I* panel remanded the case for a second trial only so that the trial court could make complete findings concerning plaintiffs' reasonable expectations. Under

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[1] "Under the rule of reasonable expectations, a court finds coverage under a policy if "the policyholder, upon reading the contract language, is led to a reasonable expectation of coverage."" *Marlo I, supra* at 316, quoting *Fire Ins Exch v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996).

the reasonable expectations doctrine, a finding that Asher signed the endorsements would have negated plaintiffs' argument that plaintiffs had a reasonable expectation of coverage under the general policy language of the contract, whereas a finding that Asher did not sign the endorsements would support the plaintiffs' claims that they has such a reasonable expectation of coverage.

Under *Wilkie*, however, whether Asher did or did not sign the endorsements does not by itself determine the existence of coverage under the policy. Rather, well-settled principles of contract construction apply to the interpretation of an insurance contract, including the principle that an enforceable contract is not created unless there has been an offer, an acceptance, and mutual assent by the parties on all essential terms. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). The essential terms of a contract, or in other words, the terms on which the minds of both parties must meet and agree, include (1) the subject matter of the policy; (2) the insured risk; (3) the duration of the risk; (4) the amount of indemnity; and (5) the premium to be paid (which must be paid at the time of the contract, or exist as a valid legal charge against the insured). *Martin v Lincoln Mut Cas Co*, 285 Mich 646, 649; 281 NW 390 (1938), citing 1 Wood on Insurance, § 5. The term premium has been defined as the "consideration paid an insurer for undertaking to indemnify the insured against a specified peril." 5 Couch, Insurance 3rd, § 69:1, p 69-5.

Here, the first trial court made a definitive finding, not challenged by plaintiffs, that plaintiffs paid no premiums for product liability coverage and that there was no meeting of the minds on this essential term of the contract. Thus, the first trial court found that no product liability coverage existed and on that basis entered judgment in favor of defendants. As the record before us does not show this finding of the trial court to be clearly erroneous, the judgment of the first trial court in favor of defendants should be reinstated.

/s/ Kurtis T. Wilder